

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Rural Health Care Support Mechanism)	WC Docket No. 02-60

**COMMENTS OF SUNESYS, LLC IN OPPOSITION TO USTELECOM’S PETITION
FOR RECONSIDERATION AND CLARIFICATION**

Sunesys, LLC (“Sunesys”) respectfully submits these reply comments in opposition to United States Telecom Association’s (“USTelecom”) petition for reconsideration and clarification¹ of the Commission’s Rural Health Care Reform order.² Sunesys is a dynamic, forward-thinking telecommunications services provider, bringing effective and cost-efficient telecommunications infrastructure solutions, including dark fiber, to a variety of institutions coast-to-coast. Without question, the Commission’s *Order* allowing dark fiber as an eligible service under the Healthcare Connect Fund (“HCF”) is the right decision for numerous reasons.

As an initial matter, the Commission’s decision to include dark fiber as an eligible service for support under the HCF will provide needed consistency within and among the universal service programs. Nearly three years ago, in its *Schools and Libraries Sixth Report and Order*, the Commission added dark fiber as an eligible service under the universal service E-rate program.³ For the Commission to reverse itself here, as USTelecom is requesting, by

¹ See Petition for Reconsideration and Clarification of the United States Telecom Association, WC Docket No. 02-60 (filed April 1, 2013) (“Petition”).

² *Rural Health Care Support Mechanism*, Report and Order, WC Docket No. 02-60 (rel. Dec. 21, 2012) (the “*Order*”).

³ *In the Matter of Sch. & Libraries Universal Serv. Support Mechanism A Nat’l Broadband Plan for Our Future*, 25 F.C.C.R. 18762, 18768 ¶ 11-12 (2010) (“*Schools and Libraries Sixth Report and Order*”).

excluding dark fiber from receiving support in the case of the HCF would result in inconsistent and illogical treatment among universal service programs. Such an outcome would not only defy common sense, it would also create unnecessary confusion.

In addition, the Commission's *Order* simply seeks to ensure maximum flexibility to rural health care providers. As the Commission concluded in the *Order*, "supporting dark fiber provides an additional competitive option to help HCPs obtain broadband in the most cost-effective manner available in the marketplace."⁴ As such, the *Order* helps to ensure that there are no artificial restrictions or artificial choices imposed upon rural health care providers. In making dark fiber an eligible service under the HCF, the Commission is really doing nothing more than adding one more option to the mix of choices available to rural health care providers. As the Commission stated,

[o]ur actions today merely ensure that HCPs have an additional option to consider during that process. If service providers can provide comparable, less expensive lit fiber alternatives, we anticipate that such providers will bid to provide services to HCPs, who are required to select the most cost-effective option. As the Commission found in the *Schools and Libraries Sixth Report and Order*, if more providers bid to provide services, the resulting competition should better ensure that applicants – and the Fund – receive the best price for the most bandwidth.⁵

And that is, at the end of the day, exactly what rural health care providers need – maximum flexibility for maximum competition. The rural health care providers that are the focus and intended beneficiaries of the HCF are located in areas where historically the least amount of competition exists. To artificially restrict rural health care providers choices even further by disallowing the eligibility of dark fiber would simply run counter to the very purposes

⁴ *Order* at ¶ 123.

⁵ *Order* at ¶ 124.

of the universal service program. In fact, in those instances where dark fiber presents a lower cost option to a rural health care provider, it will have the additional positive effect of ensuring that the already limited funds will go farther.

One need look no further than the Commission's decision to include dark fiber as an eligible service under the E-rate program to understand why it is just as prudent to include it here. Under the E-rate program, the Commission recognized that excluding dark fiber from the repertoire of options available to schools and libraries "would unduly limit the flexibility of schools and libraries to select the most cost-effective broadband solutions to meet their needs, which would be inconsistent with our schools and libraries policies."⁶ Thus, the Commission found that "broadening the scope of potential suppliers of broadband increases competitive options, which in turn enhances choice and reduces cost."⁷ The very same rationale that led the Commission to include dark fiber in the list of E-rate eligible services in the *Schools and Libraries Sixth Report and Order* applies equally here.

Finally, USTelecom's assertion that dark fiber cannot or should not be considered a "service" for purposes of universal service support stands in direct contradiction to Commission precedent to the contrary.⁸ Indeed, the Commission has understood dark fiber to be a component of basic transmission service for two decades.⁹ More recently, following on the heels of similar

⁶ *Schools and Libraries Sixth Report and Order* at ¶ 11.

⁷ *Id.*

⁸ Petition at 5.

⁹ See *In the Matter of Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, 8 FCC Rcd 2589, 2593, paras. 17-18 (1993) (finding that even "the provision and maintenance of fiber optic transmission capacity between customer premises where the electronics and other equipment necessary to power or 'light' the fiber are provided by the customer" -- referred to as "dark fiber" -- is a "wire communication," i.e., a communication service), *remanded on other grounds, Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994); see also *Global NAPS, Inc. v. New England Tel.*, 156 F.Supp.2d 72, 78 (D. Mass. 2001) (finding that the FCC treats the leasing of

recommendations made in the *National Broadband Plan*¹⁰, the Commission followed this longstanding precedent in establishing dark fiber as an eligible service under the E-rate program in the *Schools and Libraries Sixth Report and Order*.¹¹ As such, the Commission's decision to do the same for the HCF program rests on sound precedential footing.

For all of these reasons, Sunesys respectfully requests that the Commission deny USTelecom's Petition seeking to overturn the Commission's decision to include dark fiber as an eligible service under the Rural Health Care Connect Fund.

Respectfully submitted,

/s/ Alan G. Fishel
Alan G. Fishel
Stephen D. Thompson

Arent Fox LLP
1717 K Street NW
Washington, DC 20036-5342
Tel: (202) 857-6000
Fax: (202) 857-6395
alan.fishel@arentfox.com
stephen.thompson@arentfox.com

Counsel for Sunesys, LLC

dark fiber as the provision of a telecommunications service); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1478 (D.C. Cir. 1994) ("The provision of the fiber optic lines without the necessary electronic equipment to power the fiber is commonly known as 'dark' fiber service . . .").

¹⁰ "Allowing funding for ownership or leasing of dark fiber and associated communications equipment could allow recipients to use locally underutilized commercial or governmental capacity to provide lower-cost, high-value broadband instead of leased services currently eligible for E-rate discounts." Connecting America: The National Broadband Plan at 237 (Rel. Mar. 16, 2010) ("*National Broadband Plan*") available at <http://www.broadband.gov/plan>.

¹¹ See *Schools and Libraries Sixth Report and Order* at ¶ 12 ("Commission precedent refutes the contention that leasing dark fiber is not a 'service.' Because dark fiber is a service, we do not have to decide whether we could otherwise fund it under section 254(h). Moreover, like internal connections, . . . dark fiber is part of the transmission path that enables the requisite functionality (delivery of voice, video and/or data) to be delivered to the classroom. Further, contrary to opponents' arguments, we find that dark fiber does enhance access to advanced telecommunications and information services consistent with section 254(h)(2)(A).").